

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS INC.,

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9 Debtor.

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12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, NY 10004

15

16 July 12, 2016

17 10:05 AM

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23 B E F O R E :

24 HON SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc# 52697 Motion to Abstain from Consideration
2 of Plan Administrators Five Hundred Ninth Omnibus Objection
3 to Claims.

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5 Hearing re: Doc# 23551 Amended Motion for Relief from Stay
6 filed by Duncan E. Barber on behalf of

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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1 ALSO PRESENT TELEPHONICALLY:

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3 PATRICK MOHAN

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5 ERIC KILEY

6 GABRIEL GLAZER

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1 P R O C E E D I N G S

2 THE COURT: Good morning. How are you, Ms.
3 Marcus? Good morning.

4 MS. MARCUS: Good morning, Your Honor. Jacqueline
5 Marcus, Weil, Gotshal & Manges, on behalf of Lehman Brothers
6 Holdings, Inc. as Plan Administrator and the other Debtors.

7 Your Honor, I'm here for the 99th Omnibus hearing.
8 It's going to be, I believe, a very short one. There's only
9 two matters, really, one matter on the calendar today, and
10 it's a status conference. I think I'm talking too loud.
11 So, we're here with respect to the plan administrator's
12 509th Omnibus Objection to Claims, the weighted Motion to
13 Abstain --

14 THE COURT: Right.

15 MS. MARCUS: -- filed by certain of the defendants
16 in the Colorado litigation, as they call it, and the Amended
17 Motion for Relief on the stay filed by the same Colorado
18 defendants.

19 THE COURT: Right.

20 MS. MARCUS: Your Honor, as you recall the 509th
21 objection involved three parties filed by Ironbridge
22 Mountain Cottages, Ironbridge Aspen Collection and
23 Ironbridge Homes. The last time we were before you on May
24 10th, we were addressing Ironbridge's claim that the
25 prosecution of the claim objection was a tolling agreement.

1 And despite the Court's urging for the parties to
2 be practical, the Ironbridge entities were not prepared to
3 agree or move forward without the 30 days' notice provided
4 in the tolling agreement. So, on May 19th, the plan
5 administrator provided notice of the termination of the
6 tolling agreement, and the tolling agreement expired by its
7 terms on June 18th.

8 Shortly after that, on June 22nd, the plan
9 administrator did what we promised, which was to file the
10 Notice of Dismissal of the three Ironbridge (indiscernible)
11 claimants --

12 THE COURT: Right.

13 MS. MARCUS: -- from the Garfield County action.
14 We also made inquiries regarding possible dates for the
15 mediation that had been suggested by the Court, and on just
16 this last Friday, we heard back from Ironbridge's counsel
17 regarding possible mediation dates either in the third week
18 of July or the 2nd week of August.

19 Also on July 8th, a conference took place in the
20 homeowner's litigation -- that other litigation in Colorado.
21 And that was the one alluded to by Mr. Barber on the 10th,
22 when he said that there was this conference --

23 THE COURT: Right.

24 MS. MARCUS: -- that might help narrow the issues.
25 On that date, the Colorado court entered judgment on the

1 jury verdict, and I have copies for the Court, if you'd like
2 them.

3 THE COURT: Okay.

4 MS. MARCUS: Although the judge denied LB Rose
5 Ranch's motion with regard to the collateral source rule, he
6 felt that the plaintiffs could not recover more than a
7 hundred percent of their damages. Accordingly, at the end
8 of the judgment, he lists out the outstanding amounts owed
9 to each of the plaintiffs, which add up to approximately
10 \$700,000. That's the good news.

11 Unfortunately, the judgment left open a couple of
12 other items. One is that the judgment may be further
13 reduced by a settlement paid by another defendant, which we
14 think was in the amount of \$600,000. And then, it may be
15 increased by fees and costs sought by plaintiffs. So, the
16 Court has scheduled yet another hearing on September 8th at
17 which these matters will be considered.

18 So in sum, where does that leave us?

19 THE COURT: Right.

20 MS. MARCUS: With respect to the claims from the
21 perspective of LB Rose Ranch, we are still willing to
22 proceed with the mediation that the Court has suggested. In
23 order to arrive at global resolution, we believe it is
24 important to have the insurance companies participate.

25 Since the judgment was just entered on Friday,

1 we're still analyzing it, and we believe that the insurance
2 companies are doing that, as well. We don't yet know
3 whether they will participate in the litigation the Court
4 has suggested. We're prepared to spend the time to try to
5 get them to agree to participate, and we may need a little
6 bit of help from the Court in that regard, but I don't think
7 that the July -- I think it was July 21st, that week, is
8 going to be practical. We're trying to get --

9 THE COURT: Right.

10 MS. MARCUS: -- all parties to attend. With
11 respect to the Stay Relief Motion that was re-noticed for a
12 hearing today and then adjourned on our request, we still
13 believe that we have valid grounds to oppose the motion, but
14 we believe there's a better way for dealing with that, and
15 we have a couple of suggestions.

16 THE COURT: Okay.

17 MS. MARCUS: The first choice is to re-enter into
18 a tolling agreement with respect to the Garfield County
19 action only. That will ensure that the defendant's don't
20 have to worry about us moving forward with the litigation
21 while they're automatically stayed from doing that.
22 Alternatively, we could agree to provide those defendants
23 with a certain number of days' notice before we move forward
24 in Colorado, giving them the opportunity to get their to
25 stay to leave motion back on the calendar.

1 And in short, Your Honor, if I could get these
2 matters resolved -- but from our point of view, it's not
3 pressing that we do that right now. We have another
4 distribution coming up at the end of -- I think it's the end
5 of September, early October. Unfortunately, it doesn't look
6 like we're going to get there by then. I'm sure you'd like
7 to hear from Mr. Klestadt or Mr. Barber, who I believe is on
8 the phone.

9 THE COURT: Okay. Thank you, Mr. Marcus. Mr.
10 Klestadt?

11 MR. KLESTADT: Mr. Barber should be on the line.

12 MR. BARBER: Good morning, Your Honor. Duncan
13 Barber on behalf of Ironbridge Homes, Ironbridge Mountain
14 Cottage, Ironbridge Aspen Collection, Ironbridge Management,
15 Dirk Gosda, Hanson Construction and Steve Hanson, and of
16 course, Tracy Klestadt is in the courtroom with us today.

17 THE COURT: I'm listening.

18 MR. BARBER: May I make some comments?

19 THE COURT: Yes.

20 MR. BARBER: Okay, thank you. I think that
21 there's been a relatively accurate recitation of where
22 things currently sit today. We agree with the plan
23 administrator and the estate that in connection with the
24 mediation, we would like to see the insurance company also
25 participate.

1 The agenda inaccurately states some matters with
2 respect to the Stay Relief Motion. It recites that the Stay
3 Relief Motion is filed by the three -- or three of the
4 Ironbridge entities that are also the subject matter of the
5 claims objection aspect in this. But the Stay Relief Motion
6 was also filed on behalf of other defendants in both the
7 instruction defect litigation, which Ms. Marcus talked
8 about; events that happened last Friday, as well as
9 defendant -- in what I think the Debtor was referring to as
10 the Colorado litigation.

11 The Stay Relief Motion seeks relief with respect
12 to both of those proceedings, and other than my clients are
13 directly involved in both of those matters. It is true that
14 the judge in the construction defect litigation did make
15 some rulings on Friday that I think will help bring some
16 clarity to where things sit among us, and will help lead us
17 to a more productive mediation when we get to it.

18 That said, one aspect of the claims, as well as
19 the underlying state court litigation is a relative
20 determination between the parties, i.e., the Debtor and
21 Ironbridge, et al, of my clients as to the allocation of
22 responsibility with respect to the construction defect
23 claim.

24 We did not jump on the bandwagon in terms of
25 adjournment of the hearing today for the simple reason that

1 the one aspect of the Stay Relief Motion seeks to have the
2 responsibility allocated among the parties, and the
3 proceeding here in Colorado is completely now poised to do
4 that with the relevant findings.

5 The arbitration award is pending in that case.
6 The jury verdicts are now pending, and the judge here can
7 make a determination -- if you will, liquidation of that
8 liability as between our side of the parties. And we think
9 that ought to happen -- as I understand, the procedure under
10 Colorado law, it's a fairly straightforward motion, and with
11 what the Court has done here, you can make those relative
12 determinations so at least we have that liquidated. And we
13 still think that should happen.

14 We are completely supportive of a mediation. We
15 completely the notion that we get the insurance carriers
16 involved. I reached out yesterday to one of the counsel
17 that represents the construction defect litigants to do --
18 see where they're at now that the rulings have happened.

19 And in terms of a total lien versus a time period,
20 one of the concerns we have on our side is the triggering of
21 limitations period with respect to the allocation of
22 liabilities between the parties. Not surprisingly, the
23 underlying rules can be read a couple of different ways.
24 I'm not really sure how the Debtor will ultimately read
25 those. One way that we --

1 THE COURT: I need to interrupt you, Mr. Barber.
2 I've lost you at several points. And just for future
3 reference, and maybe this was not made clear to you by
4 anyone in my chambers, but typically, I don't listen to
5 folks on the phone make extensive arguments. The purpose of
6 telephonic appearances is so that if you are -- you know,
7 want to listen and have some limited participation, that's
8 fine.

9 But this goes well beyond that. So future
10 reference, I'm looking right at Mr. Klestadt, who I assume
11 will be making the argument. I find it very difficult, and
12 therefore, do not allow extensive argument on the phone.
13 So, that's just for future reference.

14 MR. KLESTADT: Your Honor, I'm (indiscernible) on
15 this one, but it wasn't clear today as to what was going to
16 be happening. You know, the stay motion was adjourned and -
17 -

18 THE COURT: Right. But I now have it -- but I'm
19 having extensive argument, if you will, suggesting various
20 courses of action. I don't want to linger too long on this.
21 We are where we are. Let's try to move forward.

22 I don't understand the last comment about the
23 issue about a statute of limitations. If the parties among
24 themselves agree to a suitable tolling arrangement, why is
25 there an issue about the statute of limitations?

1 MR. BARBER: Well Your Honor, first of all, I
2 apologize for just not having the clarity (indiscernible),
3 but Mr. Klestadt is accurate. That said, I agree with Ms.
4 Marcus that in light of the ruling last Friday, and the need
5 to go -- and the desire, and I think the advisability to go
6 forward with the mediation, that a straightforward tolling
7 agreement to deal with some of these issues makes great
8 sense, and I'd be more than happy to have that conversation
9 with her, get that in place, so that we could proceed with a
10 control -- in a controlled fashion to have the mediation.

11 THE COURT: Okay. That's good. So then, she
12 suggested one of two ways to do that. So, is there --

13 MR. BARBER: I think it has -- I'm sorry.

14 THE COURT: Is one or the other preferable to you?

15 MR. BARBER: Absolutely. I'm totally in
16 agreement.

17 THE COURT: Okay. Ms. Marcus is nodding.

18 MS. MARCUS: Yes. I actually want a chance to
19 respond to one thing --

20 THE COURT: Sure.

21 MS. MARCUS: -- at the appropriate time.

22 THE COURT: Okay. All right, so --

23 MS. MARCUS: (indiscernible) it's fine.

24 THE COURT: Okay, so then, you made some
25 clarifications, if you will, regarding the stay relief

1 motion, and I hear you, but I don't understand why we would
2 do that, if we're going to go to mediation.

3 MR. BARBER: Absolutely. I agree that if we
4 haven't -- with the idea of the tolling agreement and
5 getting a tolling agreement in place, you're right. We can
6 back off of the stay relief motion and focus on settlement
7 and not worry about, you know, various deadlines, statute
8 limitations, et cetera. And I completely would take up Ms.
9 Marcus on that concept and get that in place as a
10 substantive and procedural matter, so that we can, like I
11 said, proceed with the mediation in a controlled fashion and
12 focus on settlement.

13 THE COURT: Okay. So then, I think we're in
14 agreement.

15 (Laughter)

16 MS. MARCUS: Violent agreement, yes.

17 THE COURT: We're in violent agreement (Laughter).
18 I mean, unless I'm missing something. Then, I think what we
19 do is that we enter into -- we -- you folks enter a
20 comprehensive tolling agreement. The additional status
21 conference happens in Colorado with the plus and the minus
22 that Ms. Marcus alluded to, or not -- that something more
23 happens there.

24 And then, once the dust settles, if you will, we
25 tee you up for a mediation, and hopefully, the two of you

1 working together can prevail upon the insurance company to
2 participate. It doesn't sound as if they -- well, just
3 making an observation, it doesn't sound as if this is a
4 situation where they would be in a position to disclaim
5 coverage entirely, so it's -- you know, it seems to me it's
6 in their interest to participate at some level. But that's
7 for others to decide.

8 MS. MARCUS: We share that view, Your Honor.
9 Unfortunately we haven't gotten to acknowledge coverage,
10 which I understand is very common. The only comment that I
11 wanted to make, Your Honor, and this is a (indiscernible)
12 plan as far as we're concerned.

13 I'm a little bit confused about Mr. Barber's
14 statement about there's still the issue in the construction
15 defect --

16 THE COURT: Yes.

17 MS. MARCUS: -- litigation about allegation of
18 responsibility. Because in -- may I hand this to you, Your
19 Honor?

20 THE COURT: Yes. For Mr. Barber's benefit, Ms.
21 Marcus has handed me up the judgments on jury verdicts.
22 It's dated July 8th, 2016.

23 MS. MARCUS: If you turn, Your Honor, to page 16 -
24 -

25 THE COURT: Right.

1 MS. MARCUS: And I'm quoting -- "The Court now
2 also confirms the jury's allocation of fault." And then, of
3 course, allocates 30 percent to LB Rose Ranch for the
4 different -- for at least the first two categories. With
5 respect to the third category, I guess perhaps, there's a
6 question.

7 But it seems that the Court has already reached a
8 determination on the outpatient responsibility. I don't
9 think it matters to what we're talking about now. I just
10 wanted to clarify the record in that regard.

11 THE COURT: Well, I think it's an important
12 clarification, because the suggestion was made that the stay
13 should be lifted in order to enable that allocation to be
14 made, and you just handed this to me. But the words on the
15 page do appear to accomplish that allocation.

16 MS. MARCUS: Right.

17 THE COURT: So, Mr. Barber, can you clarify that?

18 MR. BARBER: Absolutely. I apologize for using
19 the word "allocation." I'm not talking -- I'm talking about
20 the contribution claim between the Debtor and my client,
21 because there has been now, a substantial payment made by my
22 client that will in the (indiscernible) be adjusted to bring
23 those -- to take the judge's allocations, but yet, to
24 liquidate an amount owing between the parties, i.e., the
25 collective the defendant parties. So, I'm really talking

1 about the contribution claim that is liquidated.

2 MS. MARCUS: (indiscernible)

3 MR. BARBER: The allocation was awkward.

4 THE COURT: Okay, well --

5 MR. BARBER: The allocation was awkward.

6 MS. MARCUS: (indiscernible) percent

7 THE COURT: Okay, hold -- okay, it might clarify
8 it for you, but it doesn't clarify it for me. So could you
9 --

10 MR. BARBER: Okay, here, let me say this. Let me
11 ask you this, Your Honor...

12 THE COURT: Well, maybe Ms. Marcus can explain it
13 to me, if she understands it.

14 MS. MARCUS: I think I can try, and please correct
15 me if I'm wrong. The reason that the judgment is reduced to
16 essentially now, \$700,000, as to LB Rose Ranch is because
17 certain of Mr. Barber's clients in the arbitration, which is
18 yet the third claim, paid a certain amount to these
19 claimants.

20 THE COURT: Right.

21 MS. MARCUS: So, I believe, without prejudice to
22 my client's position, that they did take the position that
23 if they paid a disproportionate amount of the settlement,
24 that they have claims back against LB Rose Ranch for that
25 amount -- for the insurance claims.

1 THE COURT: All right. Okay. All right.

2 MS. MARCUS: Did I get that right, Mr. Barber?

3 MR. BARBER: We're on the same page.

4 THE COURT: I'm sorry?

5 MR. BARBER: We are on the same page.

6 THE COURT: Okay, great. All right. So, it still
7 comes back to impressionistically -- we need to do things
8 the easy way, not the hard way. Okay? It's a not
9 insignificant amount of money, but all of these moving parts
10 are, I think, making this way more complicated than it needs
11 to be.

12 So, it seems that we have agreement in entering
13 the tolling agreement, which will maintain the status quo.
14 There will continue to be some activity by the Court with
15 respect to adjustments to this judgment. And then, there
16 will be approaches made to the insurance company. And then,
17 you'll be set up to engage in mediation.

18 Did we discuss how it was that a mediator would be
19 selected, Ms. Marcus?

20 MS. MARCUS: You had suggested, perhaps, a sitting
21 judge --

22 THE COURT: Yes.

23 MS. MARCUS: And that's as far as we got.

24 THE COURT: Mr. Barber, are you amenable to a
25 sitting judge?

1 MR. BARBER: Absolutely.

2 THE COURT: All right, because there are a few of
3 my -- well, I will try to identify one or more of my
4 colleagues who has the time to do this, and I have one or
5 two good ideas. So, I'm optimistic that that would be a
6 good thing to do.

7 So, we're going to adjourn either without date or
8 to a date certain, anything that's still pending.

9 MS. MARCUS: Yes, Your Honor.

10 THE COURT: All right? And I'm indifferent. We
11 can adjourn it to an Omnibus date sometime in the fall, if
12 you like, just for control purposes. Does that work for
13 you, Mr. Barber?

14 MR. BARBER: Well, the Court -- it wraps around
15 the tolling agreement, but I'm confident we can do that.
16 We've done one before.

17 THE COURT: Okay. So, I'll leave it to you to do
18 that. And then, should I move forward to try to identify a
19 judicial mediator? And then, the procedure that I've used
20 in the past is to have my law clerk identify the judge to
21 you folks, and then, give you some period of time. And
22 then, I would designate Ms. Marcus to report back on an
23 anonymous basis whether it's acceptable or not acceptable.

24 So in other words, if it's acceptable, it's a go.
25 If it's not acceptable, I would ask that Ms. Marcus not

1 identify the party or parties to whom it's not acceptable,
2 and that way -- Mr. Klestadt is knitting his brow at me. I
3 want to protect the party from feeling that I would have any
4 negative view of them, in the event that they did not agree
5 to go forward with the mediator that I recommended.

6 It's spelled in suspenders, but particularly you
7 know, in larger cases, there's a level of discomfort about
8 being the person who says no to a mediator --

9 MR. KLESTADT: I can't imagine we'd have any issue
10 with any of your colleagues.

11 (Laughter)

12 THE COURT: That's lovely to say, but sometimes,
13 people who you know, have a history in the Court, you know,
14 may have had a less than satisfactory experience. It's just
15 to make it anonymous so that everybody feels comfortable.

16 Mr. Barber, did I explain myself okay on that?

17 MR. BARBER: I completely understand and I'm
18 completely fine with that procedure.

19 THE COURT: Okay. And what period --

20 MS. MARCUS: I believe the Omnibus hearing I have
21 is September 20th?

22 THE COURT: I have a September omnibus --
23 September 20th Omnibus hearing.

24 MS. MARCUS: So, if September 8 (indiscernible)
25 date for the next hearing in the home owner's litigation --

1 THE COURT: Then that would work.

2 MS. MARCUS: -- (indiscernible) makes sense.

3 THE COURT: Right. So, I think at this point, I
4 could move forward with identifying the mediator, but it
5 would be premature to have him or her block out any dates.

6 MS. MARCUS: I agree.

7 THE COURT: Okay? That sounds great.

8 MS. MARCUS: That's great. Thank you, Your Honor.
9 That's where we'll end it today.

10 THE COURT: Okay, thank you. Thank you, Mr.
11 Barber, Mr. Klestadt.

12 MR. KLESTADT: Thank you.

13 THE COURT: Ms. Marcus, before you --

14 MR. KLESTADT: I'll sign out.

15 THE COURT: Okay, very good.

16 So, when next we meet, it will be the one
17 hundredth.

18 MS. MARCUS: Yes.

19 THE COURT: And I think that both LBHI and LBI
20 will be delivering stay to the estate --

21 MS. MARCUS: That's correct.

22 THE COURT: -- presentations on that day. It's a
23 pretty significant day.

24 MS. MARCUS: We were talking about cupcakes too,
25 possibly.

1 THE COURT: Cupcakes, possibly (Laughter). I was
2 speaking to Judge Pack about possibly joining us, although -
3 -

4 (Discussion off the record)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

**Sonya
Ledanski Hyde**

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